BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: CALIFORNIA QUALITY GLASS & MIRROR CORP. dba United California Glass Company 275 Barneveld Avenue San Francisco, CA 94124 Employer	Docket No. 01-R1D5-4614 **DENIAL OF PETITION FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by California Quality Glass & Mirror Corp., dba United California Glass Company (Employer).

JURISDICTION

On October 29, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted a plain view inspection and investigation at a place of employment maintained Employer at 1505 2nd Street, Napa, California (the site). On October 29, 2001, the Division issued a citation to Employer alleging a serious violation of section 1646(b)(1) [no guard railing on rolling scaffold] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations[1], with a proposed civil penalty of $2,700.

Employer filed a timely appeal contending that the safety order was not violated, the classification was incorrect, and the proposed civil penalty was unreasonable.

A hearing was held before Bref French, Administrative Law Judge (ALJ) of the Board. Harold Ticktin, Office Manager, represented Employer. Stephan A. Williams, Safety Engineer, represented the Division. On February 4, 2003, the ALJ issued a decision denying Employer's appeal. On March 3, 2003 Employer filed a timely petition for reconsideration.

[1] Unless otherwise noted, all section references are to Title 8 of the California Code of Regulations.

EVIDENCE

Employer was cited for failing to provide guardrails on an open side and end of the top platform of a rolling scaffold exposing its employees to a fall hazard.

Stephan A. Williams (Williams), an associate Cal/OSHA safety engineer testified for the Division that on October 29, 2001, while driving on a public street at around 8:30 a.m., he saw men working on a rolling aluminum scaffold on wheels that was up against the front of the Redwood Bank building. The scaffold's top platform did not have any guardrails on it. As he approached the building he took a photograph which depicts the scaffold and a man in blue jeans (who subsequently identified himself as Abner Adams) standing on the top level next to a man who is sitting on the platform with another man standing on the level below. Williams asked a worker to direct him to "his supervisor" whereupon the worker pointed to the man standing on the top level of the scaffold. Williams ordered the man to come down to ground level.

Williams conducted an opening conference with the man during which time he asked him for his name and title. The man identified himself as Abner Adams (Adams) and stated that he was Employer's foreman. Adams asked a man that he called "Dave" for a business card, wrote his name on it, and gave the card, which had the name Dave Kimel (Kimel) on it, to Williams. While discussing the scope of the job, Adams stated that Employer was replacing a large pane of glass in the front window of the bank building. Williams stated that Kimel and Adams were "trying to figure out how to do the job." It was not a simple glazing job since there were columns obstructing the work on the outside. When Williams arrived, he observed eight employees on the site performing various tasks. One employee was getting tools from a truck, five men were up on the scaffolds and some of the three men on the ground were taking caulking out of the window opening. Adams appeared to be directing the other employees.

Williams stated that there were two rolling scaffolds. The scaffold outside the window did not have any guardrails on the open ends of the platforms. The scaffold inside had a top guardrail, however, when Williams measured the height of the rail from the platform it was only 33 inches rather than 42 to 45 inches, as required for a rolling scaffold. Williams measured the outside platform at a height of 12 feet, 3 inches from ground level. To abate the violations, Adams directed the men to put up top guardrails on the outside scaffold and to take extra sections of uprights (end frames) for the ends next to the building. He had them rearrange other scaffold pieces on the inside scaffold to correct the low guardrail.

Williams cited Employer for a violation of section 1646(b)(1) because the scaffold was over 7½ feet high and it did not have any guardrails on the open

ends. He personally served Adams with the citation, noting on the proof of service that he served the foreman (Adams). He classified the violation as serious based on his experience investigating falls from heights of 12 feet, opining that a fall from that height to the concrete surface below would, to a substantial probability, result in a serious injury such as bone fractures of the wrist, arms or hips or a skull fracture. Williams has investigated at least one fall from that height which resulted in a neck fracture and permanent paralysis.

Harold Ticktin (Ticktin) testified for Employer that he was employed by Employer as its senior officer manager and supervisor, which included responsibility for "running the men"—20 union glazier employees who reported to him each morning. He stated that he approves their payrolls and provides all supplies and the fall protection equipment necessary for the work.

The workers started the planned one-day job the morning of the Division's inspection. Although Ticktin was not at the site, he thought that the workers would have been erecting the scaffolds when Williams arrived since they left San Francisco at around 6:30 a.m. to drive to Napa with the trucks that Ticktin had loaded the night before with scaffolding. To his knowledge, the employees started work around 7:30 or 8:00 a.m., and it would have taken half an hour to set up the scaffold depicted in the Division's photograph. At 8:30 a.m., when Williams arrived, the scaffold would not have been "fully set up." The top railings, which were in the truck, should have been on by 9:30 a.m. or earlier. Ticktin stated that he instructed the men to put on top railings. He did not know why the workers did not put up the guardrails "immediately" but that they could not have been on the scaffolds for "very long" without guardrails.

Ticktin testified that the eight workers on the job were an experienced "seasoned crew" because the job was a "hard set" – a difficult job to do since the glass being installed was tall and heavy. Adams, a union journeyman, has 25 years experience as a glazier and three of the other men were also journeymen each with over 5 years experience. Kimel is Employer's project manager, however, he was not at the site on the date of the Division's inspection since he only works on large projects that take more than one week. One of the men probably picked up Kimel's card at the office so as to be able to give it out to identify Employer, if necessary.

Ticktin stated that he did not "put anyone in charge" – no one was "the boss" – all of the workers were "supposed to work together as a team" to arrive at a "consensus" on how to do the job. The men consult with each other and delegate between themselves what job to do. All of them have cellular phones so that they can call the office if there is a dispute over how the job is to be done but this rarely happens. None of the glass replacement crews, which

replacement work accounts for 50% of Employer's business, are sent out with a leadman, foreman or supervisor.

Adams was not a foreman or a leadman and Ticktin never expected that he would hold himself out as a foreman. Employer gave Adams a week off without pay for using an unguarded scaffold as shown by the timesheets in Employer's Exhibit C. Ticktin stated that Adams "knows better" than to use unguarded scaffold or to "rush the job." When Ticktin asked other employees about what happened, one of them said that Adams was "eager and jumped the gun and used the scaffold before they were done with it." When Ticktin asked him why he didn't tell him [Adams] to wait, he stated that; "You can't tell him [Adams] anything, he's his own man."

ISSUES

1. Is the 30 day time limit for an ALJ to issue a decision mandatory or directory?
2. Has Employer set forth sufficient grounds to grant its petition for reconsideration?

REASONS FOR DENIAL OF PETITION FOR RECONSIDERATION

1. The 30 Day Time Limit for an ALJ to Issue a Decision is Directory, not Mandatory.

Employer asserts that the ALJ improperly extended the submission date and did not timely file the decision in accordance with section 385 which requires that a decision must be filed within 30 days after the proceedings are submitted. Thus, according to Employer, the ALJ acted without and in excess of her powers.

We have long held that the Board does not lose jurisdiction if the decision of the ALJ is not filed within 30 days of the hearing or date of submittal. *Dayton Hudson Corporation*, Cal/OSHA App. 99-912, Decision After Reconsideration (Dec. 10, 2001).

In *Dayton Hudson,* we relied upon an earlier decision, *Roof Structures, Inc.*, Cal/OSHA App. 78-478, Decision After Reconsideration (June 30, 1981). In that case, citing *Coombs* v. *Industrial Acc. Commission*, (1926) 76 Cal.App. 565 and *Peak* v. *Industrial Acc. Commission*, (1947) 82 Cal.App.2d 926, we held that the statutory language was directory and not mandatory. We stated at page 2 that, "[t]o follow Employer's argument to its logical conclusion would mean that if an administrative law judge failed to file his decision within the prescribed period, the Appeals Board would lose jurisdiction to hear the appeal

and the Division's citation and penalty would be final. Such a result was surely not intended by the Legislature or desired by Employer."[2]

Based on Board precedent, we find that the ALJ's issuance of a decision more than 30 days after the hearing did not divest the Board of its jurisdiction and authority to determine the matters which are the subject of this appeal.

2. Employer Has Not Set Forth Sufficient Grounds to Grant its Petition for Reconsideration.

Employer further contends that the ALJ's decision is "defective" in that she ignored certain evidence and contends that the evidence does not support the findings of fact.

A petition for reconsideration will be granted if an employer demonstrates that the evidence does not support the ALJ's findings of fact. Simply rearguing the evidence does not meet the requirements set forth in section 390.1(a)(3).

We give great weight to the credibility findings of the ALJ who heard the case and concluded that Adams was a foreman. There was suitable evidence presented to conclude that Adams was a foreman and that his statements to Division personnel constitute admissions. We adopt those findings and concur with the ALJ that Adams was a foreman under the circumstances testified to in this case.

In this case, Employer is apparently not satisfied with the credibility determinations made by the ALJ.

The Board has designated responsibility to ALJ's to listen to the testimony given, calculate the demeanor of the witnesses; assess the credibility of the witnesses; and assign weight to conflicting testimony. The findings of the ALJ are entitled to deference unless they are opposed by evidence of considerable weight. (*Lamb* v. *Workmen's Compensation Appeals Bd.*, (1974) 11 C.3d 274, 280.)

Asking permission to present new evidence at the petition for reconsideration level so that the Board can entertain the testimony of Adams does not warrant granting reconsideration. There has not been a showing by Employer that the evidence sought to be considered through Adams could not have been presented at the hearing and therefore is "new evidence" within the meaning of Labor code section 6617(d).

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[2] In *Novo-Rados Enterprises*, Cal/OSHA App. 76-305, Decision After Reconsideration (Feb. 23, 1983) while addressing the same issue, we noted at page 12 that, "[t]he courts have gone much further, characterizing the position, like that taken here by Employer as 'absurd'."

DECISION

The Board affirms the decision of the ALJ finding a violation of section 1646(b)(1) and assessing a civil penalty in the amount of $2,700.

MARCY V. SAUNDERS, Member
GERALD P. O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: April 18, 2003